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SOUTHERN DISTRICT OF CALIFORNIA	
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10 UNITED STATES BANKRUPTCY COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 In re: ) BANKRUPTCY CASE NO. 05-15215-H7  
13 DONALD ALLEN BUSH, ) MEMORANDUM DECISION  
14 Debtor. )  
15

16 Debtor claimed \$150,000 homestead exemption under California  
17 Civil Code Procedure ("CCP") 704.730(a)(3)(C). Richard M.  
18 Kipperman, Chapter 7 trustee ("trustee"), objected on the ground  
19 that debtor's gross annual income exceeded the \$15,000 statutory  
20 threshold. At issue is the meaning of gross annual income under  
21 CCP 704.730(a)(3)(C).

22 This Court has jurisdiction to determine this matter  
23 pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order  
24 No. 312-D of the United States District Court for the Southern  
25 District of California. This is a core proceeding pursuant to  
26 28 U.S.C. § 157(b)(2)(B).

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1 I.

2 FACTS

3 Debtor filed his voluntary Chapter 7 petition on October 16,  
4 2005, and claimed \$150,000 homestead exemption. Debtor is a sole  
5 proprietor doing business as Bush Financial Services and is also  
6 a sales representative, independent contractor, for Linsco  
7 Private Ledger. Debtor's 2005 tax return showed business income  
8 in the amount of \$3861 and adjusted gross income in the amount of  
9 \$3588.

10 II.

11 DISCUSSION

12 California Civil Code Procedure § 704.730 provides in  
13 relevant part:

14 (a) The amount of the homestead exemption is  
15 one of the following:

16 . . . . .

17 (3) One hundred fifty thousand dollars  
18 (\$150,000) if the judgment debtor . . . who  
19 resides in the homestead is at the time of  
20 the attempted sale of the homestead any one  
21 of the following:

22 . . . . .

23 (C) A person 55 years of age or older with a  
24 gross annual income of not more than fifteen  
25 thousand dollars (\$15,000). . . and the sale  
26 is an involuntary sale.

27 Thus, there are three requirements that debtor must meet to  
28 be eligible for the \$150,000 homestead exemption: 1) he must be  
55 years of age or older; 2) have gross annual income of not more

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1 than \$15,000; and 3) the sale must be an involuntary sale.<sup>1</sup>

2 In interpreting the term "gross annual income," in the  
3 exemption statute, the trustee urges this Court to adopt the  
4 reasoning and rationale set forth in In re Sweitzer, 332 B.R. 614  
5 (Bankr. C.D. Cal. 2005). On the other hand, debtor argues that  
6 Kendall v. Shelley (In re Shelley), 109 F.3d 639 (9th Cir. 1997)  
7 sets forth the rule of law this Court is bound to follow.

8 THE SHELLEY CASE

9 The debtors in Shelley owned a retail store which had gross  
10 receipts in excess of \$300,000 during the year prior to  
11 bankruptcy filing. However, during that time, the debtors'  
12 expenses exceeded the gross income and the debtors' business  
13 produced a loss of over \$68,000. The debtors' business incurred  
14 further losses up until the time of their bankruptcy filing.  
15 Shelley v. Kendall (In re Shelley), 184 B.R. 356 (B.A.P. 9th Cir.  
16 1995). Debtors claimed the higher exemption for their homestead  
17 under CCP 704.730(a)(3)(C) and the trustee opposed contending  
18 that their gross income exceeded the statutory threshold for  
19 married couples. The bankruptcy court equated gross annual  
20 income with gross receipts and found the debtors were entitled to  
21 only a \$75,000 exemption.

22 On appeal, the Bankruptcy Appellate Panel (the "BAP")

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23  
24 <sup>1</sup> It is undisputed that debtor met the age requirement, however, the  
25 trustee argued that the sale was voluntary since debtor had entered into a  
26 contract for sale of the real property prior to his bankruptcy filing pursuant  
27 to a family law decree. Debtor sought this Court's approval for the sale of  
28 the real property postpetition. At the hearing on this matter, the Court  
found the trustee's argument without merit since the filing of a bankruptcy  
petition is the functional equivalent of a forced or involuntary sale under  
California law. Katz v. Pike (In re Pike), 243 B.R. 66, 70 (B.A.P. 9th Cir.  
1999).

1 reversed. The BAP examined statutes under the California Tax and  
2 Family Codes to ascertain the meaning of gross annual income  
3 under the exemption statute. Under the Tax Code, only the costs  
4 of goods sold are subtracted from gross receipts. Id. at 359.  
5 The BAP noted that under the Tax Code, the debtors' gross annual  
6 income would be more than the threshold under the exemption  
7 statute. Id.

8 The BAP next examined the California Family Code (the  
9 "Family Code") which defined annual gross income to mean "income  
10 from whatever source derived" including "income from the  
11 proprietorship of a business, such as gross receipts reduced by  
12 expenditures required for the operation of the business." Cal.  
13 Fam. Code § 4058(a)(2). The BAP also considered the "practical  
14 realities and circumstances of owning a business," and found that  
15 "only the profits (revenues minus costs) of the business are  
16 available to benefit the business owner." Id. The BAP noted  
17 that this last concept was incorporated into the definition of  
18 annual gross income found in Family Code § 4058(a)(2). Id.

19 The BAP reasoned that since the homestead exemption should  
20 be construed liberally, sole business proprietors should be able  
21 to deduct the costs of product and legitimate expenses from gross  
22 receipts of the business" to retain the maximum homestead amount  
23 . . . ." Id. at 360 (emphasis added). The BAP was affirmed by  
24 the Ninth Circuit. Shelley, 109 F.3d 639 (9th Cir. 1997).

25 Thus, Shelley stands for the proposition that the term  
26 "gross annual income" as used in CCP 704.730(a)(3)(C) should be  
27 given the more flexible definition as that set forth in the  
28 Family Code (versus the definition set forth in the Tax Code) so

1 as to allow sole proprietors to reduce gross receipts by costs of  
2 product and other legitimate expenses required for the operation  
3 of their business.

#### 4 THE SWEITZER CASE

5 In Sweitzer, the debtor was a college professor/consultant  
6 whose wages exceeded the statutory threshold under CCP  
7 703.703(a)(3)(C). Sweitzer, 332 B.R. at 614. The debtor,  
8 however, sought to offset against his income, his share of losses  
9 of an "S" corporation. Id. at 615.

10 The Sweitzer court engaged in a similar analysis as the BAP  
11 in Shelley by examining both the tax laws and the Family Code.  
12 The court analyzed case law that interpreted gross income for tax  
13 purposes for those engaged in a service business. 332 B.R. at  
14 617. The court noted that the definition of gross income under  
15 the tax law was different for those engaged in a service business  
16 versus a mining, manufacturing and merchandising business. Id.  
17 Thus, while agreeing with the holding in Shelley as it applied to  
18 a retail business, the court determined that if the primary  
19 source of a debtor's income was from services, deductions from  
20 gross receipts should not be allowed. Id.

21 The Sweitzer court found support for its interpretation of  
22 "gross annual income," with respect to a debtor whose income was  
23 derived from performing services, from Family Code § 4058. The  
24 court noted that Family Code § 4058 makes a distinction "between  
25 income based on commissions, salaries and royalties under  
26 subsection (a)(1) from 'income from the proprietorship of a  
27 business, such as gross receipts from the business reduced by  
28 expenditures required for the operation of the business' . . .

1 under subsection (a) (2)." Id. at 618. The court evidently was  
2 convinced that the debtor fell within the scope of subsection  
3 (a) (1) because there was little evidence presented other than W-2  
4 forms which showed debtor's income was primarily from services he  
5 rendered as a college professor or consultant. Moreover, no  
6 deductions related to the debtor's income were at issue. Rather,  
7 it was the offsetting of an investment loss against income that  
8 the Sweitzer court found troublesome. The court thought it  
9 "improper to allow a debtor, whose income from wages and  
10 consulting services alone exceeds the \$20,000 threshold, to come  
11 back below the threshold by offsetting investment losses." Id.  
12 The court determined that the debtor was not entitled to the  
13 higher exemption under CCP 704.730(a) (3) (C).

#### 14 ANALYSIS

15 It is undisputed that debtor is a sole proprietor who offers  
16 financial services. The trustee argues that Sweitzer applies  
17 because the debtor's primary source of income is from rendering  
18 services and, therefore, it would be inappropriate to allow  
19 reductions from gross income.<sup>2</sup> The Court disagrees. Sweitzer  
20 does not stand for a *per se* rule that a debtor, whose income is  
21 derived primarily by rendering services, is not entitled to any  
22 reductions from gross receipts. Rather, the Court must first  
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24 <sup>2</sup> The trustee also argued that the debtor's gross annual income was in  
25 excess of the \$15,000 threshold since the family court had imputed income to  
26 the debtor of \$70,000 per year. The trustee contends that a loan in the  
27 amount of \$10,000 from debtor's parents, cash advances from credit cards, or  
28 cash from refinancing the residence should also be included in the broad  
definition of gross income. The trustee did not cite any authority for his  
arguments that these items should be included for purposes of calculating the  
debtor's gross annual income under the exemption statute. The Court declines  
to include such amounts in debtor's income.

1 examine the context in which the debtor's income is derived, and  
2 then determine what reductions, if any, are appropriate given the  
3 Shelley court's directives. No offsets, such as the investment  
4 loss in Sweitzer, are at issue in this case.

5 The Shelley court rejected the more limiting definition of  
6 gross income under the Tax Code and adopted the more flexible  
7 definition under Family Code § 4058(a)(2). That means when there  
8 is an operating business, such as Bush Financial Services, and  
9 there are legitimate business expenses, the debtor's gross  
10 receipts are reduced by those expenditures required for the  
11 operation of the business to arrive at "gross annual income" for  
12 purposes of the exemption statute. There is no specific  
13 requirement that a debtor be engaged in a more "capital intensive  
14 enterprise such as retail sales." Sweitzer, 332 B.R. at 618.

15 The debtor's Schedule C on his 2005 tax return shows gross  
16 receipts of \$31,879 and expenses of \$28,018. Debtor's return  
17 shows his business income was \$3,861 and his adjusted gross  
18 income was \$3,588. Debtor declared that his earnings for 2005,  
19 the appropriate year for calculating his gross annual income,  
20 arose solely from the operation of his business which is a sole  
21 proprietorship. He also declared that he had no carry forward  
22 losses or ownership interests in any "S" corporations and had no  
23 further losses to offset his business income. The debtor also  
24 attached various receipts evidencing his expenses "required for  
25 the operation" of his business. The trustee has not refuted any  
26 of this evidence.

27 This Court has ample evidence that the debtor's primary  
28 source of income was from his sole proprietorship and, even

1 though that income was from the performance of services, the  
2 debtor is entitled to reduce from gross receipts those  
3 "expenditures required for the operation of the business" per the  
4 holding in Shelley.

5 Debtor's gross annual income therefore falls below the  
6 statutory threshold of \$15,000 and he is entitled to the \$150,000  
7 exemption.

8 III.

9 CONCLUSION

10 The Court finds that debtor's gross annual income is below  
11 the \$15,000 statutory threshold and he is entitled to the  
12 \$150,000 homestead exemption.

13 This Memorandum Decision constitutes findings of fact and  
14 conclusions of law pursuant to Federal Rule of Bankruptcy  
15 Procedure 7052. The debtor is directed to file with this Court  
16 an order in conformance with this Memorandum Decision within ten  
17 (10) days from the date of entry hereof.

18  
19 Dated: July 19, 2006

20   
21 JOHN J. HARGROVE  
22 United States Bankruptcy Judge  
23  
24  
25  
26  
27



**UNITED STATES BANKRUPTCY COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**  
325 West F Street, San Diego, California 92101-6991

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In re: Bankruptcy Case No. 05-15215-H7

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

**MEMORANDUM DECISION**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

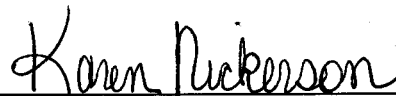
**Attorney(s) for Trustee:**

**Gary B. Rudolph, Esq.**  
**Dennis G. Bezanson, Esq.**  
**Sparber Rudolph Annen, APLC**  
**701 "B" Street, Suite 1000**  
**San Diego, CA 92101**

**Attorney(s) for Debtor:**

**Michael G. Doan, Esq.**  
**Doan, Levinson & Liljegren, LLP**  
**2850 Pio Pico Drive, Suite D**  
**Carlsbad, CA 92008**

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on July 19, 2006.



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Karen Nickerson (Deputy Clerk)  
Judicial Assistant to the Honorable John J. Hargrove